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# Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution

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**Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special  
Education Dispute Resolution**

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Defended April 19, 2011

## **Abstract**

In the United States, 6.8 million children receive special education services, and disputes over their education can become highly adversarial. This thesis examines due process hearings, which are the last resort for parents in special education conflicts, and evaluates the fairness of those hearings. Using interviews with judges and data from hearings between 2000-2009 in Wisconsin and Minnesota, I find that special education due process hearings are unfair because they inconsistently provide procedural protections, damage parent-school relationships, and provide insufficient outcomes for students. I conclude that a new system should replace special education due process hearings in the future.

## **Acknowledgments**

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## **Introduction**

“What we have here is a failure to communicate.”<sup>1</sup> With these words, administrative law judge Brian K. Hayes summed up the relationship between a mother and school district after the mother sued the district when a teacher broke her son’s arm. At the time, her son, a 17-year old student with a severe cognitive disability and oppositional defiant disorder, was having a violent outburst and the teacher was attempting to restrain him. The student’s mother filed for a due process hearing when the school district refused to comply with her request that the student be transferred to a different school within the district following the incident. During the due process hearing, it became clear that the mother and the district officials not only disagreed about what disciplinary measures were appropriate for the student, but they had completely different understandings of the nature of the student’s disability. At the end of the hearing, Judge Hayes determined that while the teacher broke the student’s arm, the district did not break any laws and therefore the student should attend the school chosen by the district officials. After months of battling the school district, the mother lost the case.

Between 2000 and 2009 another 198 special education disputes in Wisconsin and Minnesota resulted in due process hearings. In all 199 cases, a failure to communicate and cooperate led parents and school districts to seek a third party ruling on their conflict. All of these cases shared a commonality: the parties could not reach an agreement without resorting to the final and most legalized form of dispute resolution available in special education conflicts. Most of the cases also shared a second commonality: the school district prevailed in the due process hearing.

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<sup>1</sup> [Student] v. Fond du Lac School District, LEA-00-034 (2000).

Is due process the best way to guarantee that children with disabilities receive a good education? In the United States, we understand education to be both a fundamental and legal right. Until 1975, however, many states had laws barring disabled children from attending public schools.<sup>2</sup> In 1975, Congress passed the Education for All Handicapped Children Act (renamed the Individuals with Disabilities Education Act in 1990), which required states to educate disabled children in public schools. In an effort to guarantee that schools respected the law, the Education for All Handicapped Children Act also gave parents of disabled children the right to challenge “inadequate” schools by pursuing a due process hearing. Now, 36 years later, we need to reevaluate due process as the mechanism for dispute resolution in special education conflicts.

In this thesis, I argue that due process is not a fair mechanism for special education dispute resolution. Due process fails to ensure consistently that students get a good outcome and that parents and districts feel fairly treated by the process. Ultimately, the system fails to hold districts accountable for providing a good education to all disabled children, and along the way due process exacts a heavy emotional toll on all parties involved.

In order to make the case that due process fails to provide a fair dispute resolution mechanism in a special education context, I begin by offering a framework for interpreting fairness as a multi-dimensional concept. Building on the limited existing literature, I identify three types of fairness (objective, subjective, and outcome) and analyze due process hearings with regard to those three. After considering the hearings with respect to objective fairness (the traditional procedural elements of due process),

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<sup>2</sup> Thomas Hehir and Sue Gamm, “Special Education: From Legalism to Collaboration,” in *Law and School Reform: Six Strategies for Promoting Educational Equity*, ed. Jay Philip Heubert (New Haven, CT: Yale University Press, 1999).

subjective fairness (the parties' perceptions of fairness), and outcome fairness (the fairness of the outcome for the student), I conclude that due process hearings are not a fair mechanism for dispute resolution in the context of special education.

### **A Context for Special Education Due Process**

Before discussing the fairness of special education due process hearings, it is necessary to understand the sphere in which these hearings take place. A highly regulated world, special education's many rules dictate not only which procedures must be followed but also which people must follow them. One primary law establishes the rules surrounding special education, and a due process hearing is only one method of resolving the disputes that arise when parents feel school districts are not following those rules.

The Individuals with Disabilities Education Act (IDEA) provides guidelines and requirements for special education services nationwide. IDEA was first passed in 1975 and is reauthorized roughly every five years, its latest reauthorization taking place in 2004.<sup>3</sup> It outlines thirteen categories of disabilities for students<sup>4</sup> and governs the

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<sup>3</sup> Alan Abeson and Jeffrey Zettel, "The End of the Quiet Revolution: The Education for All Handicapped Children Act of 1975," *Exceptional Children* 44, no. 2 (1977). The IDEA was originally named the Education for All Handicapped Children Act (EAHCA) and was renamed the Individuals with Disabilities Education Act in 1990.

<sup>4</sup> *Individuals with Disabilities Education Act*, 20 U.S.C. § 1401 (3)(A) (2004). The categories covered by IDEA 2004 are: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment (less severe than complete deafness), mental retardation (often referred to as a cognitive impairment), multiple disabilities, orthopedic impairment, other health impaired (including disorders such as ADD, Tourette syndrome, Asperger's syndrome, etc.), specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment including blindness.



education of 6.8 million children,<sup>5</sup> making it the preeminent special education law in the United States. To be eligible for special education services, a child must have at least one of the thirteen disabilities listed under the IDEA, and that disability must hinder the student's capacity to receive educational benefit from the school and therefore require special services.<sup>6</sup>

One critical provision of the IDEA is the right of each student to a “free, appropriate public education,”<sup>7</sup> also referred to as FAPE. The provision of FAPE includes the appropriate and timely evaluation of students for special education services and the creation of an Individualized Education Plan (IEP), which names the services a child will receive and presents a step-by-step plan as to how those services will be provided in a way that is “reasonably calculated to provide educational benefit”<sup>8</sup> to that child. FAPE also requires districts to fully carry out the terms of a student's IEP.<sup>9</sup> These are rights explicitly included in IDEA, though Congress has never outlined a complete substantive definition of FAPE.<sup>10</sup>

By enumerating the rights of disabled students, the IDEA gives students and their guardians the right to challenge school districts when they believe districts are not providing the student with FAPE. Should students and their guardians wish to avail themselves of their right to challenge school districts, several avenues are open to them.

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<sup>5</sup> “Office of Special Education Programs Home Page,” last modified December 29, 2009, <http://www2.ed.gov/about/offices/list/osep/index.html?src=mr>.

<sup>6</sup> Cortiella, Candace, *IDEA Parent Guide: A Comprehensive Guide to Your Rights and Responsibilities under the Individuals with Disabilities Education Act (IDEA 2004)* (New York: National Center for Learning Disabilities, 2006), [http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?\\_nfpb=true&\\_ERICExtSearch\\_SearchValue\\_0=ED495879&ERICExtSearch\\_SearchType\\_0=no&accno=ED495879](http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED495879&ERICExtSearch_SearchType_0=no&accno=ED495879).

<sup>7</sup> Board of Education v. Rowley, 458 U.S. 176 (1982).

<sup>8</sup> Ibid.

<sup>9</sup> Dixie Snow Huefner, “Updating the FAPE Standard under IDEA,” *Journal of Law & Education* 37, no. 3 (2008).

<sup>10</sup> Mitchell Yell and Erik Drasgow, “Litigating a Free Appropriate Public Education,” *The Journal of Special Education* 33, no. 4 (2000).

There are five primary methods of dispute resolution: an informal meeting, a facilitated IEP meeting, a complaint with the Department of Education, mediation, and a due process hearing. However, parents and districts need not proceed sequentially through the five stages along the continuum; the parties may start at any stage and may opt to bypass any of the methods. If parents wish to do so, they may jump straight to the most formal option, a due process hearing. This thesis focuses primarily on what happens at the due process hearing stage, but in order to understand the role of a due process hearing in the overall dispute resolution system, it is important to recognize the steps parents are going through (or choosing to avoid) to reach that stage.

Under the IDEA, guardians may request an informal meeting as one possible course of action. Informal meetings give parents an opportunity to express their concerns to district officials, which is often all parents need to prevent minor disputes from becoming a full-blown conflict.<sup>11</sup> Another dispute resolution option is a facilitated Individualized Education Plan (IEP) meeting. Parents and district officials hold an IEP meeting any time a district makes changes to a student's education plan.<sup>12</sup> In a facilitated IEP meeting, a facilitator joins the meeting to establish rules and help the parties stay focused on material, rather than personal, issues.<sup>13</sup> The third option for parents is filing a complaint with the state Department of Education. Parents submit a form to the Department of Education that can be found on the department's website.<sup>14</sup> State officials

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<sup>11</sup> *Wisconsin Special Education Mediation System: IEP Facilitation, Mediation, Resolution Process*, brochure (Hartland, WI: Burns Mediation Services, [2005-2008]).

<sup>12</sup> "Individualized Education Program (IEP) Team Meetings and Changes to the IEP," last modified October 4, 2006, <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C9%2C>.

<sup>13</sup> *Facilitated IEP Meetings*, Action Information Sheet (Minneapolis: PACER Center, 2004).

<sup>14</sup> "IDEA State Complaints," last modified March 2, 2009, <http://dpi.wi.gov/sped/complain.html>.

review the complaint and issue a decision on whether the district must change its practices to be in compliance with the law.

If parents and districts are unable to resolve conflicts through one of these processes, the fourth option is mediation. Mediation is a slightly more formal dispute resolution session, attended by an arbiter tasked with getting the parties to enter into a binding agreement that may be enforced by a court.<sup>15</sup> Attorneys are sometimes present at mediation sessions, but in accordance with IDEA 2004, school districts may not bring an attorney to the session unless the parent is accompanied by legal representation.<sup>16</sup> Even if the parent brings an advocate to mediation, the district cannot bring an attorney as long as the advocate is not a legal expert.<sup>17</sup>

The first four options are all fairly informal methods of dispute resolution that involve parents and districts working together to reach an agreement through collaboration. If the parties cannot reach an agreement through one of the first four options, they can pursue a due process hearing, which is the most formal of the dispute resolution options<sup>18</sup> and the option that most concerns this thesis. The hearings are held in a manner similar to a court trial, which positions parents and school districts opposite each other as adversarial parties. Following a civil trial structure, each party at a due process hearing has the opportunity to make an opening statement, elicit testimony from witnesses, cross-examine witnesses brought by the opposing party, present evidence and

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<sup>15</sup> *Preparing for Special Education Mediation and Resolution Sessions: A Guide for Families and Advocates* (Washington, DC: The Advocacy Institute and The Children's Law Clinic at Duke University School of Law, 2009).

<sup>16</sup> *Individuals with Disabilities Education Act*, 20 U.S.C. § 1415 (f)(1)(B)(i)(III) (2004).

<sup>17</sup> Perry Zirkel and Gina Scala, "Due Process Hearing Systems under the IDEA: A State-by-State Survey," *Journal of Disability Policy Studies* 21, no. 1 (2010).

<sup>18</sup> Andrea Shemberg, "Mediation as an Alternative Method of Dispute Resolution for the Individuals with Disabilities Education Act: A Just Proposal?" *Ohio State Journal on Dispute Resolution* 12, no. 3 (1997).

exhibits, and make a closing argument.<sup>19</sup> An administrative law judge oversees the process and serves as a neutral third party arbiter to guide both parties during the hearing. After the conclusion of the hearing, the administrative law judge writes an opinion listing his or her decision and the reasoning behind that decision.<sup>20</sup>

Due process hearings are not ideal for parents, districts, or students. If the dispute has progressed to the level of a hearing without resolution, the conflict is either of an immensely complex nature or at least one of the parties has demonstrated an unwillingness to cooperate or compromise. Because due process hearings are the most legalized special education dispute resolution stage, attorneys are more frequently brought in at the due process hearing than at any other stage.<sup>21</sup> They can aid both parties in understanding the procedures and help move the hearing along smoothly. However, they can also contribute to delays in the process and heighten the tense, adversarial nature of the proceedings.<sup>22</sup>

At the end of the hearing, if one of the parties disagrees with the decision made by the administrative law judge, the only real remaining option is to appeal the decision to the even more formal and adversarial environment of the United States federal court system.<sup>23</sup> The courts are separate from the five initial dispute resolution options available to parents and districts because courts only serve an appellate function in special

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<sup>19</sup> Kevin J. Lanigan, Rose Marie L. Audette, Alexander E. Dreier, and Maya R. Kobersy, "Nasty, Brutish...and Often Not Very Short: The Attorney Perspective on Due Process," in *Rethinking Special Education for a New Century*, eds. Chester E. Finn Jr., Andrew Rotherham, and Charles R. Hokanson Jr. Washington, DC: The Thomas B. Fordham Foundation and the Progressive Policy Institute, 2001.

<sup>20</sup> Lawrence M. Siegel, *The Complete IEP Guide: How to Advocate for Your Special Ed Child*, 6th ed. (Berkeley, CA: Nolo, 2009).

<sup>21</sup> Interview with administrative law judge, December 10, 2010.

<sup>22</sup> Hazel G. Genn and Yvette Genn, *The Effectiveness of Representation at Tribunals: Report to the Lord Chancellor*, London: Queen Mary College, Faculty of Laws, 1989.

<sup>23</sup> Therese Craparo, "Remembering the 'Individuals' of the Individuals with Disabilities Education Act," *New York University Journal of Legislation and Public Policy* 6 (2003).

education disputes. When parents are seeking a remedy for the denial of a free, appropriate public education under the IDEA, they must first attempt to resolve the issue through a due process hearing. Until parents and districts have exhausted the “administrative remedies,” courts will not hear IDEA claims.<sup>24</sup>

Congress has attempted to paint due process as a last resort and steer parents and districts away from due process hearings whenever possible. For example, when Congress reauthorized IDEA in 1997 and again in 2004, they amended the law to strongly encourage mediation, even after parents have filed for a due process hearing.<sup>25</sup> Within 15 days of receiving notification that parents have filed for a hearing, districts are required by law to convene a mandatory resolution session with parents unless both parties agree to proceed to mediation. At a resolution session, parents must explain the grounds for their due process hearing request and present the evidence that supports their position. Districts and parents can agree to waive the resolution session, but if districts do not agree to waive it and parents fail to appear, the district can move to have the due process hearing request dismissed.<sup>26</sup> As an alternative to the resolution session, districts must offer free, voluntary mediation to parents as a last attempt to reach an agreement before the hearing, though parents may still refuse to participate in mediation at that stage.<sup>27</sup>

Each special education dispute resolution option has advantages and disadvantages. Regardless of the dispute resolution path parents and districts take, if no

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<sup>24</sup> *Individuals with Disabilities Education Act*, 20 U.S.C. § 1415(l); If the remedy sought is not one available under the IDEA, such as monetary damages, prior to filing a claim in court a party is “not required to exhaust the formal administrative processes of the IDEA.” *Witte v. Clark County School District*, 197 F.3d 1271, 1276 (9th Cir. 1999).

<sup>25</sup> Demetra Edwards, “New Amendments to Resolving Special Education Disputes: Any Good IDEAs?” *Pepperdine Dispute Resolution Law Journal* 5, no. 1 (2005).

<sup>26</sup> *Preparing for Special Education Mediation and Resolution Sessions*.

<sup>27</sup> Lanigan et al., “Nasty, Brutish.”

agreement can be reached, all paths ultimately lead to a due process hearing. The issue then becomes whether due process produces appropriate outcomes and is perceived as a fair process by the parties involved. This thesis seeks to determine whether due process hearings achieve these goals.

## **Methodology**

I draw on both quantitative and qualitative data in order to consider whether due process achieves these goals with respect to special education conflicts. Quantitatively, due process hearing decisions provide information about which parties win due process hearings under different conditions. Qualitatively, I conducted interviews with administrative law judges who preside over special education due process hearings. By combining quantitative with qualitative data, this paper assesses both objective measures of the effectiveness of due process hearings as well as subjective reactions to the fairness of the hearings.

Special education due process hearing decisions supplied the quantitative data for my thesis. I collected information from 199 hearings in Wisconsin and Minnesota that took place between 2000 and 2009. The data from those hearings are available through the hearing decisions written by administrative law judges, and I collected those decisions from the Minnesota Department of Education and Wisconsin Department of Public Instruction online records. All hearing decisions are public documents with students' names removed. Special education due process hearings address a wide range of issues and concerns. While the details of every case differ, I identified recurring

patterns across the 199 cases that fell into seven main categories. The Appendix lists those categories, their frequency in my research, and an explanation of the issues comprising each category. The decisions contain information about the award granted to the winning party, which gave me insight into the tangible outcomes that the hearings produce for students. The decisions also provided me with data about whether an attorney was present for either party, allowing me to ascertain whether attorney presence impacts parties' access to procedural protections and perceptions of fairness. All of this information contributes to a clearer understanding of hearing outcomes, the efficacy of the procedural aspects of the hearings, or the factors influencing parties' perceptions of hearing fairness.

In addition to gathering data from the due process hearing decisions, I also conducted interviews over the phone and in person with administrative law judges. The interview subjects were judges in Wisconsin and Minnesota who presided over special education due process hearings during the 2000-2009 window of my study. I interviewed eight of the twelve judges who presided over hearings during my study and are still currently serving as administrative law judges.

Because the information included in due process hearing decisions is limited to the facts of a case, a judge's opinion, and that judge's rationale for that opinion, the hearing decisions alone cannot provide an assessment of the dynamics between the parties or speak to the ways in which the decisions impact students. The purpose of these interviews was to fill in some of those gaps left by the due process hearing decisions. All judges consented to participate in an interview with the understanding that their comments would be confidential; consequently, any interview excerpts included in this

thesis will be attributed to “an administrative law judge,” rather than to a specific judge by name.

I chose Minnesota and Wisconsin as an opportunity sample for my research. When beginning this research, I had familiarity with both states’ education systems, and both states made hearing decisions readily accessible. Although they are an opportunity sample, Minnesota and Wisconsin appear to be representative of the majority of the country. Both states have similar due process procedures and hold special education due process hearings at roughly the national rate. The number of due process hearings in any given year varies from state to state and is dependent upon the number of hearing requests filed by parents and school districts. In a study where all fifty states were ranked in descending order based on the number of hearings held in each state between 1991 and 2005, Minnesota ranked 25<sup>th</sup> and Wisconsin was 27<sup>th</sup>.<sup>28</sup> As a result, the findings in this thesis are more generalizable outside of these cases than if Minnesota and Wisconsin had ranked at either extreme end of the spectrum. My research is based on 199 cases during a ten-year period. The hearing results cannot be easily attributed to anomalies as they could be in a state such as Utah (ranked 50<sup>th</sup> with only 14 hearings between 1991 and 2005),<sup>29</sup> nor were there so many hearings that the results would be simply infeasible to study over the course of one year (as would have been the case with a state like New York, ranking 1<sup>st</sup> in hearing frequencies between 1991 and 2005 with more than 16,000 hearings.)<sup>30</sup>

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<sup>28</sup> Perry A. Zirkel and Karen L. Gischlar, “Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis,” *Journal of Special Education Leadership* 21, no. 1 (2008).

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.



### Three Types of Fairness

The data collected through this research speaks to a concern of parents and school districts alike: whether due process hearings are a special education dispute resolution system both fair in practice and perceived as fair by participants. The wide range of interpretations and measures of “fairness” makes answering this question daunting, but this territory is not entirely unexplored. A trailblazing 1988 study conducted by Steven Goldberg and Peter Kuriloff on the fairness of special education due process hearings employs two types of fairness to guide an assessment of hearing fairness: objective fairness and subjective fairness.<sup>31</sup> Objective fairness relates to the procedural rights possessed by each party, and subjective fairness refers to the parties’ experiences with the system and their perception of the due process hearing system’s fairness. By drawing this distinction between types of fairness, Goldberg and Kuriloff make the argument that fairness is a multidimensional concept that must be assessed in more than one context. This thesis builds on Goldberg and Kuriloff’s view as a framework for assessing the fairness of special education due process hearings by adding a third type of fairness for consideration: outcome fairness.

Goldberg and Kuriloff argue that special education due process hearings are objectively fair but not subjectively fair. In terms of objective fairness, they suggest that the hearings achieve their intended purpose because both parties do have the opportunity to influence the outcome of the hearing. Parents and districts both “have the right to receive adequate notice, to examine school records, to be represented, to call and cross-examine witnesses, to be heard by an impartial hearing officer, and to appeal adverse

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<sup>31</sup> Steven S. Goldberg and Peter J. Kuriloff, “Evaluating the Fairness of Special Education Hearings,” *Exceptional Children* 57, no. 6 (1991).

decisions.”<sup>32</sup> These hearing elements reflect several constitutional protections and are traditional features of legalized proceedings.<sup>33</sup> Special education due process hearings are designed to incorporate “the characteristic features of legalization [which] include a focus on the individual as the bearer of rights...and court-like procedures to enforce and protect rights.”<sup>34</sup> Goldberg and Kuriloff arrive at their conclusion that special education hearings are objectively fair proceedings because these procedural elements are available to both parties.

Goldberg and Kuriloff tell a different story about subjective fairness. They measure subjective fairness by whether parents and district officials perceive the due process experience to be fair. They explain that Congress arranged for the due process system in special education disputes with the goal that parents would feel their voices were being heard and that they were being treated fairly during dispute resolution. Goldberg and Kuriloff’s survey of special education due process hearing participants shows that Congress’ goal has not been met. They find that “only 41% of the parents believed the hearings were completely or almost completely fair. Indeed, a larger number of parents (35%) had very negative views, perceiving the hearings as substantially unfair.”<sup>35</sup> As a result, Goldberg and Kuriloff conclude that “special education hearings do not achieve this more subjective form of fairness.”<sup>36</sup> Based on these findings, Goldberg and Kuriloff assert that a due process hearing is not an ideal

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<sup>32</sup> Goldberg and Kuriloff, “Evaluating the Fairness,” 546.

<sup>33</sup> Henry J. Friendly, “Some Kind of Hearing,” *University of Pennsylvania Law Review* 123, no. 6 (1975).

<sup>34</sup> David Neal and David L. Kirp, “The Allure of Legalization Reconsidered: The Case of Special Education,” *Law & Contemporary Problems* 48, no. 1 (1985): 65.

<sup>35</sup> Goldberg and Kuriloff, “Evaluating the Fairness,” 551.

<sup>36</sup> *Ibid.*, 553.

mechanism for special education dispute resolution but that the hearing system should remain in place because it provides essential procedural protections.

Goldberg and Kuriloff are missing an element in their evaluation of hearing fairness: the fairness of the outcome to the student. The only discussion of outcomes in Goldberg and Kuriloff's article relates to parents' and districts' perception of the fairness or accuracy of a hearing outcome. However, the extent to which hearings produce outcomes that actually benefit students and contribute to their educational progress is highly relevant to whether these hearings are fair to students, and an assessment of outcomes should be included in any conversation about whether due process hearings should remain the final option for special education dispute resolution. My thesis shows that the hearings fail the test for outcome fairness because they frequently produce outcomes that are "too little, too late" for students.

This thesis also challenges Goldberg and Kuriloff's position on objective fairness. Goldberg and Kuriloff use only one criterion to determine whether the hearings are objectively fair: the existence or nonexistence of procedural protections. In this thesis, I argue that while the existence of procedural protections is important, objective fairness should also take into consideration the extent to which those protections are accessible to all parties. Because many parents—particularly those without legal representation—are unable to avail themselves of the procedural protections, the hearings should not be deemed objectively fair.

Goldberg and Kuriloff's arguments concerning subjective fairness are more convincing, however, and this thesis underscores their findings through more recent research on special education due process hearings. Like their measure of objective

fairness, Goldberg and Kuriloff use a binary criterion for subjective fairness. For Goldberg and Kuriloff, the hearings are either subjectively fair because the parties perceive the hearings to be fair, or the hearings are not subjectively fair because the parties perceive the hearings to be unfair. This thesis supports their evaluation that the hearings are not subjectively fair. I also take their measure of subjective fairness a step further and conclude that the hearings are not subjectively fair because of the personal toll they take on the relationships between the parties.

This thesis examines special education due process hearings with regard to subjective fairness and outcome fairness, analyzing the ways in which the hearings impact the future for students, parents, and districts. I conclude that due process hearings fail the measure of both outcome and subjective fairness. My thesis then turns to objective fairness to determine whether the procedural protections can salvage the hearings and justify the continued use of due process as the final dispute resolution option in special education conflicts. I conclude that the hearings also fail with regard to objective fairness, making them a poor option for the final stage of special education dispute resolution. This paper then looks at whether an alternative system could be fairer.

### **Subjective Fairness**

I begin my evaluation of due process hearing fairness with subjective fairness. Because due process hearings are the final option in special education dispute resolution, parents' and districts' perceptions of the efficacy and fairness of that option matters. Due process may be a last resort in special education disputes, but the participants should feel

at the conclusion of the proceedings like they achieved a fair resolution through a fair process. This section addresses Goldberg and Kuriloff's findings regarding subjective fairness and parties' perceptions of the hearings; I then build on their findings with more recent evidence and a new dimension of subjective fairness involving damaged relationships.

Goldberg and Kuriloff discuss subjective fairness and conclude that special education due process hearings do not achieve the standard of subjective fairness. They express concerns that hearing participants do not perceive the process to be fair and that the hearings are both emotionally and financially costly. Goldberg and Kuriloff offer convincing evidence from surveys in support of these concerns. They present multiple examples of parents and district officials alike portraying the due process system lacking in fairness from the participants' viewpoint. Goldberg and Kuriloff attribute this to the emotional toll exacted by the hearings, the antagonism created between parents and districts, and the tendency of participants to view a hearing as unfair if they do not prevail.

Although their concerns arise from special education due process hearings between 1980 and 1984, they remain applicable today. The due process hearings take an emotional toll on parents and damage parent-district relationships after the hearing has been decided. Even for parents who win, the hearings do not always provide sufficient awards or a sense of subjective fairness. Due process hearings may not produce outcomes that address parents' true concerns, regardless of whether parents prevail and are awarded the services requested in their complaint. Although parents may be interested in obtaining more services for their child, they often have other underlying

motivations in pursuing due process. Prior to due process, parents who are only interested in changing a child's services have several opportunities to reach an agreement with the district regarding the services provided to the student. If an agreement cannot be reached, parents sometimes file for due process simply because they are angry at, or frustrated with, the school district.

### *Hollow Victories*

For some parents, by the time an issue reaches the due process stage, the battle is no longer about services for the student; they want to prove a point to district officials they perceive as uncooperative. Goldberg and Kuriloff interviewed parents who had prevailed in their hearing, and even victorious parents still maintained, “‘It shouldn’t have to go so far. It was a personal thing. They didn’t think I’d do it. It cost me grief and aggravation. It cost them money which they could have used to educate.’”<sup>37</sup>

Another parent acknowledged, “‘Things could have been resolved beforehand. [But the district] wanted to show me they couldn’t be challenged. I have a funny feeling there’s going to be another fight.’”<sup>38</sup> Both of these parents had cases that were sufficiently meritorious to win at the due process hearing stage and confessed that their concerns could have been dealt with at an earlier stage of dispute resolution. They did not push for a due process hearing because it was impossible to obtain the services they wanted prior to a due process hearing; they pushed for a hearing to send a message to the district.

A victory may give parents some satisfaction in knowing they have defeated the district, but that satisfaction is temporary and not every parent who pursues a hearing to

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<sup>37</sup> Peter J. Kuriloff and Steven S. Goldberg, “Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings,” *Harvard Negotiation Law Review* 2 (1997): 41.

<sup>38</sup> Goldberg and Kuriloff, “Evaluating the Fairness,” 554.

retaliate against a school district wins their hearing. Whether parents win or not, the due process hearings are not intended to resolve the personal battles between parents and districts. Adversarial proceedings seek to resolve factual disputes, not to repair broken relationships. Rebecca Sandefur uses the example of a child custody dispute surrounding a divorce and points out that “many aspects of a participant’s experience—hostility, hurt, anger, feelings of betrayal—are not comprehended by law and do not have legal treatments or solutions.”<sup>39</sup> Similarly, a due process hearing is not designed to provide relief for the feelings of hostility and anger that parents may be experiencing during heated disputes with a school district over their child’s special education services. The hearings are ill-suited to satisfy parents searching for a resolution for the tension with a school district. At best, special education due process hearings offer parents vindication rather than a long-term remedy for anger and resentment between parents and districts.

Even in cases in which the parties are motivated only by the desire to obtain the best possible services for the student, the drawn-out nature of due process hearings may diminish the importance of the final decision. By the time a decision is reached, which can take months to years, the award granted to a prevailing parent is often a hollow victory. In these protracted proceedings, “it is not difficult to identify examples of cases that have consumed inordinate amounts of time and money to reach decisions that are proverbially too little too late.”<sup>40</sup>

This can be illustrated for any of the possible hearing outcomes when parents are the prevailing party. A parent may be able to persuade the administrative law judge to

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<sup>39</sup> Rebecca L. Sandefur, “Elements of Expertise: Lawyers’ Impact on Civil Trial and Hearing Outcomes” (working paper, Stanford University, Palo Alto, 2009: 6).

<sup>40</sup> Perry A. Zirkel, “The Over-Legislation of Special Education,” *West’s Education Law Reporter* 195 (2005): 36.

overturn an expulsion for a special education student, but that reversal cannot erase the emotionally traumatic expulsion proceedings the parents and student had to endure prior to the due process hearing. In a hearing in which parents challenge a school's ability to provide a free and appropriate public education for their child, a parent may be successful at convincing a judge of their position and requiring the district to pay tuition at the private placement the parent requested for their child. However, tuition payments do not negate the district's past failures that led an administrative law judge to determine that the district denied the student a free and appropriate public education. Awarding parents tuition payments by the district also cannot make up for the emotional strain on the student who must now change schools, leaving behind their friends and the familiarity and convenience of their neighborhood school.

#### *Unintended Outcomes – Damaged Relationships from Due Process*

Regardless of which party wins the hearing, damaged relationships are frequently an unintended outcome that negatively impacts both parties. One of the most critical flaws with the due process system is the toll it takes on the relationship between parents, the school district, and the student.<sup>41</sup> Certainly the relationship between parents and districts can deteriorate along the road leading to due process, but the due process hearing itself aggravates the situation and often pushes the relationship to the point of no return.

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<sup>41</sup> Zirkel, "Over-Legislation of Special Education;" Steven S. Goldberg and Peter J. Kuriloff, "Doing Away with Due Process: Seeking Alternative Dispute Resolution in Special Education," *West's Education Law Reporter* 42 (1987); Lanigan et al., "Nasty, Brutish;" Jan Marie Fritz, "Improving Special Education Mediation," *International Review of Sociology* 18, no. 3 (2008); Craparo, "Remembering the 'Individuals;'" Shemberg, "Mediation as an Alternative;" Tracy Gershwin Mueller, "Alternative Dispute Resolution: A New Agenda for Special Education Policy," *Journal of Disability Policy Studies* 20, no. 1 (2009); Jeannie Lake and Bonnie Billingsley, "An Analysis of Factors that Contribute to Parent-School Conflict in Special Education," *Remedial and Special Education* 21, no. 4 (2000); Neal and Kirp, "The Allure of Legalization Reconsidered."



Parents and districts have a strained relationship when they begin a due process hearing, and the relationship continues to degenerate throughout the hearing process until it is damaged beyond repair. One administrative law judge explained that by the time the parties have gone through a due process hearing, “whoever has won, student or district, it doesn’t really matter; [both parents and districts] are so bitter having gone through the litigation that the relationship between the school and the student is poisoned going forward...that happens far more than 50% of the time.”

Parents and school districts are often well on their way to a poisoned relationship before a due process hearing even begins. Due process hearings are the final stage in special education dispute resolution. For that reason, if a conflict has reached the due process stage, the parents and school district have either attempted and failed to resolve the problem at multiple prior stages or mutually opted to bypass other forms of dispute resolution. Either way, both parties have an extensive history and are carrying a lot of emotional baggage when a dispute gets to due process. An administrative law judge said of due process hearings:

They’re very emotional cases and they’re very hotly contested...this is your kid, and people get real emotional about their kids...It’s full-out war and everything’s at issue. These are people who have tried everything and everything has failed. They’re really hardened into their positions.

Both districts and parents may dig in their heels at the due process stage, which might be expected given the extreme emotional component of the hearings and the stakes each party has riding on the outcome of the hearing. Another judge pointed out, “In those cases that go to hearing, the reason they’re going to a hearing is because the parties feel strongly about their position and the righteousness and correctness of their position. They both believe they should prevail.” Yet another administrative law judge

commented, “It can be very contentious. Emotions run really high and there can be a lot of acrimony in these hearings.” The emotionality weighs particularly heavily as a factor in the case of parents’ perceptions of the hearings:

These disputes evoke their basic protective instincts and the deep parent-child identifications. These attachments can make parents’ stakes in a particular outcome so high that only the most sensitive school district officials have the ability to respond effectively to their demands. Sometimes, the parties to a highly emotional special education dispute may become prisoners of differing norms, unable to agree on any resolution.<sup>42</sup>

When the parties begin the due process hearing prepared to wage an intense emotional battle, they set the stage for conflict, not cooperation.

The structure of the due process hearing itself does nothing to alleviate the tension between the parties. The stages preceding due process are intended to resolve conflicts through cooperation and communication between the parties. Due process hearings are different. By design, the due process hearing forum is not conducive to cooperation and building a positive relationship for the future; the goal is for a third party arbiter to reach a decision about which party is in the right. Because of this third-party resolution design, “there is no possibility for any conflict resolution or collaboration between parents and school districts once [a due process hearing] takes place. Although the hearing officer may resolve the conflict, it is typically at the financial and emotional expense of both parties.”<sup>43</sup> Cooperation between parties is a welcome bonus but not a necessary feature of the hearings, and hearing officers are neither obligated nor actively encouraged to promote cooperation.

In fact, the adversarial American civil court system functions as a model for the due process system, in which the parties are pitted against each other as opponents. The

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<sup>42</sup> Kuriloff and Goldberg, “Is Mediation a Fair Way,” 65-6.

<sup>43</sup> Mueller, “A New Agenda for Special Education Policy,” 5.

hearings “foster mutual perceptions of dishonesty between the parties and often result in deep suspicion and hostility between parents and school officials.”<sup>44</sup> As a result, school districts and parents in due process hearings enter the due process arena from the beginning as opponents with the goal of defeating the other party. One parent characterized her experience as being ““like a war. You’re the enemy. It’s like walking into a combat zone. The due process system doesn’t do anything.””<sup>45</sup> Parents do not have a monopoly on that type of experience; district officials report similarly negative ordeals. One official declared that parents often have ““no case and, in general, off-the-wall people use the hearings to harass the school district.””<sup>46</sup> These kinds of reports are not isolated. The special education due process system has the potential to create widespread hostility and resentment between parents and school districts.

Part of the adversarial design of due process hearings involves hearing decisions that use language such as “prevailing party.” The hearings are arranged to determine a winner and a loser and grant the winner a corresponding award. In doing so, “the IDEA inherently creates an antagonistic framework for dispute resolution because parents are rewarded for prevailing over the school district.”<sup>47</sup> This adversarial design presents a problem for maintaining a positive relationship between district and parent, and hearing participants commonly “feel that the due process hearing is an inappropriate forum for resolving educational disputes because of the antagonism it creates.”<sup>48</sup>

The antagonistic atmosphere often leads to a rapid deterioration of whatever good will either party had toward the other when beginning the due process hearing. At the

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<sup>44</sup> Lanigan et al., “Nasty, Brutish,” 227.

<sup>45</sup> Goldberg and Kuriloff, “Evaluating the Fairness,” 554.

<sup>46</sup> Ibid.

<sup>47</sup> Shemberg, “Mediation as an Alternative,” 743.

<sup>48</sup> Ibid.

due process stage, parents and districts frequently no longer want to cooperate and are intent on making the process more difficult for the other party, even if that comes at the expense of a quicker resolution.<sup>49</sup> Not only does that hinder the effectiveness of due process proceedings in reaching a fair, timely decision, but also it is “unfortunate (and can have tragic consequences) when a child is being denied adequate services while the dispute remains unresolved.”<sup>50</sup>

The consequences of this adversarial design do not end at the conclusion of a due process hearing. The effects of a poisoned relationship after the hearing has taken place are often the highest not for the district or the parents but for the student. Due process hearings lead to less cooperation between the parties moving forward after the hearing, and “a less cooperative relationship between parent and school can cause subsequent problems with development of IEPs and conflict resolution with respect to changing educational placements.”<sup>51</sup> Parties sometimes retaliate against each other, and the students’ position makes them a prime target for retaliation by one or both parties when parents and districts harbor resentment and want to send a message to the other party.<sup>52</sup> Districts are in a position to lower the quality of a child’s services to retaliate against parents, and parents can unilaterally pull their child out of a district providing appropriate services to that child simply to spite the district. As one judge put it, “You see parents moving their children from district to district if they think they can’t work with one

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<sup>49</sup> Lanigan et al., “Nasty, Brutish.”

<sup>50</sup> Ibid., 227.

<sup>51</sup> Shemberg, “Mediation as an Alternative,” 743.

<sup>52</sup> Mark C. Weber, “Litigation under the Individuals with Disabilities Education Act After *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,” *Ohio State Law Journal* 65, no. 2 (2004).

district anymore. It's hard to patch up the relationship if they're unhappy with the result."

When the relationship between parents and districts has sustained that much damage, future disputes have the potential to quickly escalate. Parents and districts that have gone through a due process hearing have less hesitation resorting to due process again in the future. One administrative law judge explained:

We see cases come back two or three times sometimes, where we had the hearing on the issue and made a ruling, and [districts and parents] go back and the relationship is so bad that they're now back again for something else, or the same thing again, and then again. Because, now, they can't work together at all and every little thing becomes, 'Okay, now I'm going to file a claim.'

The channels of communication between parents and districts frequently shut down in the wake of a due process hearing, which can prompt the parties to jump to a due process hearing over small issues rather than attempting to come together to work out problems. When the relationship reaches that stage, little hope remains that parents will be able to productively participate in shaping their child's education, which was one of Congress' initial goals when it created the due process system.<sup>53</sup>

Rather than encouraging parents to "come away feeling they had been fairly treated,"<sup>54</sup> due process hearings often leave parents coming away feeling bitter. Even when victorious, parents' motivations for pursuing a hearing may go unaddressed, and the best award available sometimes cannot make up for what they have endured prior to the hearing. For these parents, and for the districts that reciprocate the feelings of bitterness, special education due process hearings fail to provide a sense of subjective fairness. While this measure of fairness speaks to the experience of districts and parents,

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<sup>53</sup> Goldberg and Kuriloff, "Evaluating the Fairness."

<sup>54</sup> Ibid., 553.

it relates to students only by proxy. The next section will examine the extent to which due process hearings offer fair outcomes to students.

### **Outcome Fairness**

Due process hearings fail to provide subjective justice for parents and frequently damage the relationship between parents and districts. However, because the purpose of a due process hearing is to resolve a dispute over a child's education, the failure to provide subjective justice for parents might be excused if the hearings truly produce good educational outcomes for the students. This section addresses whether due process hearings are more successful at benefiting students than they are at satisfying parents.

Though Goldberg and Kuriloff address due process hearing procedures and participant perceptions of hearing fairness, they focus solely on district officials and parents. Their evaluation notably lacks a discussion of whether the outcomes are ultimately fair to those whom they primarily concern: students. Special education due process hearings determine what will happen with a child's future education. Consequently, in order to determine whether due process hearings are a fair final dispute resolution option in special education conflicts, the interests of students should be taken into account as well as the interests of parents and districts.

Since the parties in a due process hearing are technically parents and districts, this section will first frame the possible due process hearing outcomes in terms of a parent victory or a district victory. This section will then discuss what a parent victory or district victory means for the student involved and whether due process hearings

ultimately have the ability to produce a good educational outcome for the student regardless of the prevailing party.

### *Why Pursue a Due Process Hearing?*

It is important to think about not only who wins these due process hearings but also what they win. The breakdown of wins and losses does not provide information about the impact of a hearing on a child's education. The outcomes of due process hearings and what exactly the parent and school district win or lose tell a much more detailed story about how due process hearings affect children's education.

For parents, the hearings are highly emotional proceedings; parents have a lot invested in the outcome of the hearing because the proceedings are about their child. As one administrative law judge put it, "Parents get very emotional and they want the best for their kids, and since these hearings are all about their kids, they've got a lot at stake." Parents also stand to gain more by winning a hearing than districts do, since parents are almost always the party initiating the hearing and asking that a change be made. As a result, districts fight to defend the status quo while parents fight to create a change. If parents win, they are usually awarded the change they seek; if parents lose, no change takes place in a child's services and parents must try a different avenue if they continue to be dissatisfied with their child's services.

The nature of the change awarded to victorious parents differs depending on the central hearing issue. Although the outcome of a parent victory can look different depending on the case, I have constructed four broad categories into which the different parent victory outcomes fit: compensatory education, reversed manifestation

determination, change of placement, and specific course of action. These four categories are unique to parents, as each category relates to an error the administrative law judge found the district had made. Table 1 further explains these categories, outlines each parent victory category, explains which issues lead to each category, and describes the tangible outcome usually corresponding to a win in each category.

**Table 1. Parent Victory Outcomes in Special Education Due Process Hearings**

<b>Outcome</b>	<b>Hearing Issue</b>	<b>What the Outcome Means</b>
Compensatory Education	The district is accused of failing to comply with the IDEA or provide a necessary service to the student	Student is awarded a certain number of hours of education the district must provide outside the regular school day; the number of hours is determined by the district's violation
Reversed Manifestation Determination	The district is accused of improperly disciplining a student (often regarding expulsion) when the district made a determination that the student's behavior was not a manifestation of his/her disability	Disciplinary record is amended or expunged to reflect accurate manifestation determination; in the case of expulsion, the student must be re-enrolled in the district
Change of Placement	In these hearings a parent feels the student's school cannot provide a free, appropriate public education and is asking the district to pay for transportation to another school or pay the child's tuition at a private school	If the judge agrees with the parents, the district must pay to transport the student to a different school or pay partial or full tuition for the student at a private school
Specific Course of Action	A parent is asking for the district to provide a specific service for the student or take a specific course of action, such as reevaluating a student for special education eligibility	The district must carry out the course of action that the parents have requested and a judge has granted



The stakes are high for districts as well as parents because the costs of losing can be so great. If parents are awarded compensatory education, districts must provide financial resources and personnel to provide additional education for that student, which can be difficult. When districts lose cases in which placement is the central issue, districts are, at minimum, responsible for transportation costs to the school chosen by the parent; in cases of private school placement districts can be forced to pay tens of thousands of dollars in tuition costs at a private school of the parent's choosing. Most public school districts do not have budgeted funds to pay for private school tuition. In those cases, it becomes a matter of the utmost concern for districts that they do not lose the hearing. Even in hearings in which the outcome requires districts to provide a new service well within the district's means to a student, the time and energy necessary to change the student's IEP and restructure the services the student receives can be highly taxing on district personnel.

Districts have a much easier path to victory than do parents for two reasons. The first relates to the burden of proof. Parents have the burden in due process hearings because in almost every hearing, parents are the party bringing the suit and the party desiring a change in the child's education. As a result, parents must convince the judge that the district violated the law and that a change is warranted in their child's education. If parents fail to meet their burden, it means victory for districts, which simply maintains the status quo and allows districts to proceed with a child's education the way they would have proceeded if a parent had never filed for a due process hearing.

The second reason districts have an easier path to victory in due process hearings relates to the standard required by special education law. As one judge put it, "The way

the law is set up, it's hard for parents to win these cases.” The IDEA does not establish a particular level of education to which special education students are entitled. In *Board of Education v. Rowley*, the Supreme Court went a step beyond what the text of the IDEA fails to mention. Justice Rehnquist's opinion expresses the Court's belief that Congress “equated an ‘appropriate education’ to the receipt of *some* educational services...implicit in the congressional purpose of providing access to a ‘free appropriate public education is the requirement that the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child”<sup>55</sup> (emph added). The use of the term “some” to describe the level of education districts are required to provide is crucial; as long as districts are providing some educational benefit to students and not violating any expressed provisions of the IDEA, the district should prevail in due process hearings.

One administrative law judge acknowledged:

The *Rowley* decision sets a pretty low bar obviously...it requires the school district to craft a program to allow the child to advance in the general curriculum. It's a fairly amorphous standard and I think it's generally acknowledged that it's not as high as it could be...The standard, as it stands, gives the school district a lot of room to craft a program and still meet that standard.

The burden in the hearings is on the parents to show that the district did not meet those two criteria, which presents a challenge given the low threshold of “some” educational benefit.

The quantitative data from my research bears out the notion that districts have an easier road than parents in due process hearings. In my study of 199 Wisconsin and Minnesota cases, parents prevailed in 20. Six of those cases resulted in an award of compensatory education, three were reversed manifestation determinations, six were changes of placement, and five resulted in a specific course of action. In the other 179

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<sup>55</sup> *Board of Education v. Rowley*, 458 U.S. 176 (1982).

cases (90% of the time), the district prevailed on all or most of the issues contested at the hearing.

Because each party potentially faces substantial gains or losses depending on whether they win or lose a hearing, the stakes are high for both districts and parents in special education due process hearings. Regardless of whether parents win or the district wins, the outcome impacts the student's education. Accordingly, students have a high stake in the hearing outcomes as well. Their situation differs from that of parents or districts, however, because it is not always clear whether a child will benefit more from a parent victory or a district victory. Although parents are listed as appearing "on behalf of" their child in due process hearing decisions, both parents and school districts claim to represent the best interests of the student involved at the hearing. This calls for further investigation into what type of outcome truly promotes the best interests of the student.

### *Students and Due Process Hearing Outcomes*

In order to fulfill their legal responsibility, school districts must provide students with an education that enables them to make some educational progress. That progress does not need to be considerable. The prevailing metaphor for schools is that they must provide "the educational equivalent of a serviceable Chevrolet to every handicapped student...not...a Cadillac."<sup>56</sup> While the analogy is a bit outdated, the sentiment remains; the IDEA does not require school districts to provide elaborate educational plans for disabled students, nor does the IDEA allow judges in due process hearings to require that districts do so. Consequently, due process hearings are not well suited to provide educational outcomes for students that are better than "some" educational benefit.

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<sup>56</sup> Doe v. Board of Education of Tullahoma City Schools 9 F.3d 455, 459-60 (6th Circ. 1993).

Several administrative law judges remarked that they felt the law tied their hands at times when the student would have been better served by a higher standard for districts. One judge explained, “Many times at the end of a case, I’ve made my ruling and I wish there were other things I could do, because I know there are things that would make the outcome better, but I don’t have the ability to do that. The law doesn’t give me that power.” At least in some cases, due process hearings are not giving judges the freedom to make the determination the judges believe would be in the best interest of the child.

Even assessing the effectiveness of a due process hearing outcome can be difficult. One reason for this is that no one can tell whether a hearing outcome will significantly benefit a student or not at the time a judge makes a due process hearing decision. Because parents must show that a student failed to make adequate educational progress in order to meet their burden in due process hearings, a time lapse occurs after a hearing decision. Progress is shown through improvement over time, which means that there is a gap after the judge’s order is implemented while both parties wait to see whether the student will in fact make progress given the outcome of the hearing.

That time lapse presents a danger to students in the event that the judge’s decision turns out insufficient. Several years can pass between the time a parent expresses a concern with their child’s lack of progress and the time another judge makes the determination that a hearing outcome was not adequate for the child. In the meantime, that student has spent several years without receiving an appropriate education. A judge can later order that the district compensate the loss of education, but to a certain degree the damage has already been done. Although the time lapse concern would exist regardless of the dispute resolution mechanism and is not unique to due process hearings,

the hearings create a scenario that makes the time lapse effect particularly pronounced.

Because districts must be given a chance to show that the child is making progress based on the judge's ruling, parents may not be able to intervene quickly after the hearing and successfully deem the hearing outcome insufficient.

Even beyond the time frame, assessing the impact of due process hearings can be problematic. Any number of factors can influence the way a child learns, and the isolated impact of one specific factor can be tricky to measure. A child may improve as a result of a hearing outcome granting compensatory education hours, but a child may also advance over the same period due to unrelated factors such as a new friendship, a change in the home environment or renewed support from parents that the student needed in order to make improvement in the classroom. Conversely, a child may fail to make progress because of an insufficient hearing outcome, but it may be the case that they are failing to make progress because of a deteriorating home situation. Cases certainly exist where a hearing outcome can be said to likely contribute to a child's level of educational improvement, but fully attributing a child's progress or lack of progress to a hearing outcome alone proves nearly impossible.

Due process hearings do not appear to be an ideal vehicle for guaranteeing significant student improvement. School districts have a low bar when it comes to providing an appropriate education, and parents shoulder a difficult burden in due process hearings. The law does not allow judges in due process hearings to find in favor of the parents if it means going above and beyond ordering the minimum benefit to a student. Regardless of the hearing outcome, the time lapse required to determine the sufficiency

of the outcome can be risky for students, and other factors influencing a student's education present a challenge to making the sufficiency determination in any case.

An examination of subjective fairness and outcome fairness reveals that due process hearings neither offer a positive experience for parents nor result in good outcomes for students. To the extent that Goldberg and Kuriloff address these categories, they agree. They argue, however, that due process hearings should remain the final option in special education dispute resolution. They contend that objective fairness through procedural protections saves due process hearings. The next section will assess whether due process hearings truly provide objective fairness and whether procedural protections are sufficient to warrant due process' place as the ultimate level of special education dispute resolution.

### **Objective Fairness**

With special education due process hearings failing to provide a subjective sense of fairness among the parties or fair outcomes, objective fairness remains the only hope for due process hearings. Objective fairness relates to the traditional elements associated with due process: procedural protections. Goldberg and Kuriloff conclude that the hearings provide procedural protections and that the availability of those protections in special education due process hearings justifies the position of the hearings as the final stage in special education dispute resolution. This section evaluates how accessible the procedural protections are to the parties to determine whether procedural protections and objective fairness can ultimately save due process in a special education context.

Goldberg and Kuriloff find that special education due process hearings meet the standard for objective fairness. They determine that the hearings offer sufficient judicial protections, such as the right to call and cross-examine witnesses, and that those protections are available to both parties. Goldberg and Kuriloff are particularly concerned with whether both parties have the ability to influence the outcome of the hearing through the opportunity to present testimony and evidence. They argue that the hearings satisfy this measure of objective justice, since both parents and districts were able to prevail in hearings where they called witnesses, including experts, and submitted evidence in support of their case.

Goldberg and Kuriloff run into problems when they fail to address the differences between procedural protections in theory and procedural protections in practice. While both parties have the same procedural rights on paper, districts are usually much more capable of using those protections to their advantage in practice than are parents because districts have greater financial resources and more experience than parents.<sup>57</sup> Greater financial resources and easier access to the knowledge and skills of legal representation give districts an advantage that is difficult for parents to overcome. Parents and districts may have the same procedural protections, but they generally do not have the capacity to use those protections with the same degree of efficacy. Districts often have prior experience with due process hearings and always have the resources to hire legal representation. Hearing protections such as the right to receive adequate notice of hearing proceedings or to appeal adverse decisions cannot erase the deficit between

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<sup>57</sup> Marc Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change," *Law & Society Review* 9, no. 1 (1974): 114. Parties with more financial resources and experience are more likely to prevail in trials.

districts with extensive resources and parents without prior experience or sufficient resources to hire an attorney.

In order for due process hearings to be objectively fair, procedural protections must function both in theory and in practice. Both parents and districts must actually be capable of availing themselves of the protections that exist on paper for the protections to serve their intended purpose, but “for those parents unable to use the hearing process to their advantage (perhaps through an inability to afford counsel, poor advocacy skills, or lack of financial support), due process might not promote objective justice.”<sup>58</sup> Consequently, when parents do not have attorneys, districts remain the likely victors, regardless of the existence of procedural protections. Procedure ultimately proves to be a façade behind which the resource disparity between parents and districts remains unchanged.

The presence of attorneys at least correlates with—and very likely contributes to—parties’ ability to avail themselves of the legal and procedural protections of due process. The presence of legal counsel is a clear difference between parties that prevail and those that do not. For any of the dispute resolution options, but particularly at the due process hearing stage, parents may consult an attorney should they wish to do so. IDEA gives both districts and parents a right to representation, which can be in the form of an attorney or a non-legal expert, called an advocate.<sup>59</sup> Anyone may technically serve as an advocate,<sup>60</sup> but they are generally individuals with some training in, or knowledge

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<sup>58</sup>Goldberg and Kuriloff, “Doing Away with Due Process,” 494.

<sup>59</sup> Ibid.

<sup>60</sup> Eileen M. Ahearn, *The Involvement of Lay Advocates in Due Process Hearings* (Project FORUM at the National Association of State Directors of Special Education, 2001). This is true in all states except Delaware, Nebraska, and Tennessee, which do not allow lay advocates to represent parents at due process hearings.



of, special education and the requirements in place under IDEA.<sup>61</sup> Parents may also choose not to consult an attorney or an advocate; there is no requirement for parents to obtain representation at any stage in the process, including most appeals of a case to federal courts.<sup>62</sup> However, a parent's decision to go it alone has no bearing on the actions of the school district; regardless of whether parents retain representation, districts will always be represented by attorneys.<sup>63</sup>

Regardless of the type of case, in many fields in litigation, "parties who have lawyers do better."<sup>64</sup> Across the fields of welfare benefit hearings, eviction defenses, tax appeals, employment and social security hearings, asylum requests, divorce proceedings, housing eviction courts, and small claims courts, represented parties prevail more often than unrepresented parties.<sup>65</sup> Even comparative studies on some foreign courts with designs similar to special education due process hearings support the claim that attorneys make a difference.<sup>66</sup>

Attorneys possess a similar degree of importance in the context of special education due process hearings as in other legal contexts.<sup>67</sup> Similar to other areas of

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<sup>61</sup> *Individuals with Disabilities Education Act*, 20 U.S.C. § 1415 (h)(1) (2004).

<sup>62</sup> *Winkelman v. Parma City School District* 550 U.S. 516 (2007).

<sup>63</sup> Susan Boswell, "Parents May Self-Represent in IDEA Cases," *The ASHA Leader*, June 19, 2007.

<sup>64</sup> Galanter, "Why the 'Haves' Come out Ahead," 114.

<sup>65</sup> Sandefur, "Elements of Expertise," 1-59; Bruce D. Sales, Connie J. Beck, and Richard K. Haan, "Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?" *St. Louis University Law Journal* 37 (1993); Karl Monsma and Richard Lempert, "The Value of Counsel: 20 Years of Representation before a Public Housing Eviction Board," *Law & Society Review* 26, no. 3 (1992); Russell G. Pearce, "Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help," *Fordham Law Review* 73, no. 3 (2004); Karyl A. Kinsey and Loretta J. Stalans, "Which 'Haves' Come out Ahead and Why? Cultural Capital and Legal Mobilization in Frontline Law Enforcement," *Law & Society Review* 33, no. 4 (1999).

<sup>66</sup> Yoav Dotan, "Do the 'Haves' Still Come out Ahead? Resource Inequalities in Ideological Courts: The Case of the Israeli High Court of Justice," *Law & Society Review* 33, no. 4 (1999); Kathryn Hendley, Peter Murrell, and Randi Ryterman, "Law, Relationships, and Private Enforcement: Transactional Strategies of Russian Enterprises," *Europe-Asia Studies* 52, no. 4 (2000).

<sup>67</sup> It is worth noting that in special education the value of representation varies between the different dispute resolution options. For example, with a complaint, attorneys can give parents advice but have no active role to play. On the other hand, in a due process hearing, attorneys not only advise parents but also are

dispute resolution, special education due process hearings sometimes involve two represented parties and other times involve one represented party and one unrepresented party. The difference in hearing outcomes between the two types of cases (represented-represented and represented-unrepresented) demonstrates the significance of attorneys in special education due process hearings.

Parents without attorneys faced represented school districts in 54 out of 199 hearings (27%) in Wisconsin and Minnesota. Of those 54 unrepresented parents, zero won their case against the represented district.<sup>68</sup> Put another way, during a ten-year period, across two states, no parent was able to prevail over a school district if the parent did not have an attorney. When parents did have an attorney, they were able to prevail in some of their hearings, though still less than 15% of all cases. Table 2 shows the difference in success rates between represented and unrepresented parents:

**Table 2. Special Education Due Process Hearing Success by Representation**

<b>Prevailing Party</b>	<b>Parent Did Not Have Attorney</b>	<b>Parent Had Attorney</b>
District Prevailed	98%	62%
Parent Prevailed	0%	14%
Split Decision	2%	24%
Significance: $\chi^2 = 25.87$ , $p < .001$		

The most glaring difference is in the “Parent Prevailed” category, where the success rate for parents jumps from 0% to 14% with the presence of an attorney for the

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present at the hearings and serve as actual legal representatives during the hearings. Since retaining legal representation, in most cases, will impose at least some financial burden on parents, in early stages of dispute resolution, parents may find that the benefits of legal representation are not sufficient to justify the cost. Due process hearings are much more legalized by nature, and they are a different ballgame altogether when it comes to the benefits of legal representation.

<sup>68</sup> One hearing out of the 54 resulted in a split decision, which is considered neither a school district victory nor a parent victory.

parent. While 14% is still not a tremendous percentage—districts win the majority of the time, regardless of whether attorney presence for the parents—the stark comparison is noteworthy. It underscores the monumental challenge unrepresented parents face in special education due process hearings and makes a strong case that while attorneys may not be the determining factor in hearing outcomes, they certainly have a part to play and are able to influence outcomes to some extent. Those numbers do not give any indication about why attorneys are so influential, however.

Beyond looking at whether attorneys make a difference for their clients, then, a determination about how to increase hearing fairness should consider *why* attorneys have such a clear impact. Legal training gives attorneys an obvious advantage for their client through their knowledge of laws and how to interpret them.<sup>69</sup> In almost every area of law, attorneys’ knowledge can be the difference between winning and losing because “law’s complexity creates barriers to those not schooled in it,”<sup>70</sup> and this is particularly true in the context of special education, where the detailed and complicated law forces parents and districts to turn to the aid of a legal representative. The IDEA and the current due process hearing system are “very complex and technical, and thus difficult (if not impossible) for parents to navigate successfully without legal representation or well-trained parent advocates.”<sup>71</sup>

Beyond understanding the substance of a law, attorneys give their clients the advantage of understanding how to operate in a legal setting. At the most basic level, the job of an attorney is to present their client’s case to the court. Parents without attorneys can still argue their case before an administrative law judge, but when they training in

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<sup>69</sup> Genn and Genn, *Effectiveness of Representation*.

<sup>70</sup> Sandefur, “Elements of Expertise,” 4.

<sup>71</sup> Lanigan et al., “Nasty, Brutish,” 226.

legal procedure and do not have an attorney to guide them through procedure, presenting a coherent legal claim can be difficult. One administrative law judge experienced in watching both represented and unrepresented parties work through legal procedures in special education due process hearings said:

The procedural complexity of IDEA overwhelms a *pro se* (unrepresented) litigant, and the opportunities to go awry and get your case dismissed are plentiful. If you're not looking for those procedural minefields, you're going to stumble through them and you're going to blow yourself up. That's what the attorneys do, is know where those minefields are and get you through the procedural part of it.

Without the knowledge of how to navigate procedural minefields, unrepresented parties face an uphill struggle to have the merits of their case heard.

Both before and during a due process hearing, then, parties cannot win simply by explaining their side of the story to a judge. They must be able to introduce their position in the form of a legally valid claim, fill out the correct forms and understand what motions they need to make, and collect evidence properly and articulate to a judge why that evidence is admissible.<sup>72</sup> During the actual proceedings, unrepresented parties are still responsible for eliciting testimony that supports their position and producing valid responses to objections by the other party. Ultimately, parties must be able to make legal arguments rather than arguments that are accurate or compelling but not relevant when it comes to the law, which trained lawyers can do much more easily than someone with no legal background.<sup>73</sup>

The sheer difference in knowledge between attorneys and unrepresented parties creates a problem for the argument that due process hearings provide objective justice through procedural protections. Unrepresented parties are at a clear disadvantage. If an

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<sup>72</sup> Genn and Genn, *Effectiveness of Representation*.

<sup>73</sup> Sandefur, "Elements of Expertise," 3.

unrepresented party does not know how to respond to a hearsay objection, it ultimately makes little difference whether they are technically allowed to present evidence during the hearing. Without the knowledge of how to argue the admissibility of that evidence, unrepresented parents cannot effectively utilize that procedural protection. Procedural protections in that case are available to the represented party and not to the unrepresented party, which in my study meant that 25% of the time procedural protections were available to the school district and not to the parents. While unrepresented parents may have lost their case on the merits even if they had an attorney, there are cases in which “people whose cases merit a judgment in their favor might nevertheless lose, because they did not know how to communicate those merits effectively in the terms and through the means that courts and judges understand.”<sup>74</sup> Judges consistently echoed this concern. One administrative law judge explained that unrepresented parents,

...don’t know how to present the case in a way that allows the judge to find for them. There are certain things that you have to prove, certain burdens you have to overcome and certain points you have to establish in order to win, and unless you know what those are...you may have a wonderful case but I have to rule against you because you haven’t checked that box and gotten us to the point where I can look at the substance of the case.

Due process professes to maintain strict procedures but fails to guarantee access to those procedures for all parties. As a result, the way due process functions in a special education context sometimes competes with all three types of fairness. Hearings involving unrepresented parents potentially deny outcome fairness if judges are unable to reach the decision they believe to be the right decision for a student because unrepresented parents cannot coherently present the merits of their case. Unequal procedural protections negatively impact subjective fairness since parents who struggle to

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<sup>74</sup> Sandefur, “Elements of Expertise,” 4.

present the merits of their case in compliance with legal procedure will likely perceive the hearings to be unfair and view the process as biased toward represented districts. Due process may talk the talk of objective fairness by offering procedural protections on paper but the system fails to walk the walk when unrepresented parties do not in practice have the ability to even get a ruling on the merits of their case. Rather than protecting unrepresented parties by requiring that all parties operate within an “objective” set of procedures, due process raises a barrier to access for parties without attorneys.

### **Bidding (Fair)well to Due Process**

The special education due process hearing system fails all three fairness tests. With regard to objective fairness, the procedural protections in place for parties are not equally accessible to represented and unrepresented parties. The distinction based on representation matters because school districts have more resources to secure representation than many parents do. In terms of subjective fairness, parents frequently leave due process hearings feeling that the process was not fair. Although district officials tend to perceive the hearings as fair more often than parents do, district officials and parents alike lament the animosity that due process hearings create between parents and districts. Parents and districts are not the only parties impacted by the hearings. Students are often forgotten in the debate about due process, and the hearings do not clearly produce good educational outcomes for students. Without the ability to say that due process hearings are truly giving students good educational outcomes, the hearings do not meet the third aspect of fairness.

I do not attempt in this paper to propose a definitive alternative to due process as the final special education dispute resolution option, but I do argue that due process needs significant changes. In this section I will first assess the costs and benefits of mediation, which is the main alternative that scholars have put on the table as a replacement for due process. I will then conclude with a discussion of the future of due process in a special education context.

### *Mediation: Alternative to Due Process?*

Particularly in light of the emotional damage due process hearings can inflict on all parties involved, many have pointed to mediation as a possible solution. Parents and districts can already participate in voluntary mediation as a dispute resolution option prior to a due process hearing, but under the current system both parties must agree to participate or the mediation will not take place. This section addresses whether a type of mandatory mediation can effectively serve as the final dispute resolution option in special education conflicts, taking the place of the current due process hearing system. I will first concentrate on the potential benefits of mediation and then explain why those benefits may not be sufficient to outweigh the potential costs of making mediation the final dispute resolution option.

As a mechanism for special education dispute resolution, mediation seems to have several advantages over due process hearings. Proponents of mediation tout it as “less time-consuming, less expensive, and less emotionally costly...[than] the more adversarial due process hearings.”<sup>75</sup> Mediation takes less time than due process hearings because there are fewer procedural hoops attached to it through which parents and districts must

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<sup>75</sup> Kuriloff and Goldberg, “Is Mediation a Fair Way.”

jump. With due process hearings, there are pre-hearing motions that must be filed and ruled on by a judge, parties must have time to identify and contact witnesses including experts, the parties must sit for a mandatory resolution session before proceeding with the hearing, and the complexity of the issues involved can lead to multiple extended deadlines.

Mediation also costs less for the parties. One of the biggest differences in expense relates to attorneys. Attorneys more commonly appear at due process hearings than in mediation sessions, and attorneys' fees are a large part of a party's expense in due process hearings, especially when due process hearings get drawn out over a long period of time. With mediation, parents frequently do not bring an attorney to the mediation session, and districts may not bring an attorney to the mediation if parents do not bring an attorney, which significantly reduces the cost for both parties. Mediation also saves parties the expense of finding and compensating experts for their testimony at a hearing. Mediation sessions are between parents and districts, so the parties do not need expert witnesses to convince a third party arbiter that one side has a better case than the other.

By far the most crucial difference between mediation and due process hearings is that mediation costs less emotionally. While due process hearings are structured in a way that corrodes the relationship between the parties and are a last resort after the parties can no longer work with each other and need a third-party decision imposed, mediation only occurs after the parties have both voluntarily consented to participation. As a result, mediation is founded on the agreement between the parties to work together to reach a collaborative solution to a problem with the student's education. Parents and districts both contribute to and agree to the solution produced in mediation sessions, which gives



both parties a sense of ownership and satisfaction regarding the decision. Due process hearings lack the element of ownership because a third-party judge imposes a decision on the two parties. Many of the administrative law judges interviewed for this thesis expressed the belief that mediation almost always preserves, and in many cases improves, the relationship between parent and district, whereas the cases that go to a due process hearing almost always result in an irreparably fractured relationship between the parties moving forward.

Perhaps the strongest argument in mediation's favor is that, statistically, it works. Studies on mediations in Pennsylvania<sup>76</sup> and California<sup>77</sup> found that the mediations resulted in an agreement between the parties in 86% and 93% of the cases, respectively. Between 1998 and 2008 in Wisconsin, 78% of mediations—roughly four out of five cases—resulted in an agreement or voluntary withdrawal by the party requesting the mediation.<sup>78</sup> Over the last ten years in Minnesota, 86% of mediations ended in an agreement between the parties and did not continue to a due process hearing.<sup>79</sup> Across the nation, parents and districts that sit down to resolve a special education conflict through mediation are successful in reaching an agreement the vast majority of the time. Any time the parent and district can come to an agreement prior to a due process hearing, they are spared the costs that come with a hearing. One judge put it simply, “The availability of the mediation session has resulted in fewer of these things going to a hearing and the parties resolving it short of the hearing, which I think everyone agrees is a good thing.”

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<sup>76</sup> Kuriloff and Goldberg, “Is Mediation a Fair Way.”

<sup>77</sup> Fritz, “Improving Special Education Mediation.”

<sup>78</sup> Wisconsin Special Education Mediation System; contact Jane Burns for the data.

<sup>79</sup> Minnesota Department of Education Special Education Alternative Dispute Resolution (ADR) Fiscal Year 2010 Report.

Mediation certainly offers a number of definite benefits but has faults as well. While the goal is to reach an agreement prior to a hearing, and fewer attorneys involved in the process saves money for both parties, the design of the mediation system potentially leaves unrepresented parents vulnerable to situations in which they agree to settle for less than a due process hearing would give them.<sup>80</sup> One judge expressed, “I worry that parents unrepresented during early mediation might not understand the full scale of what they might be able to recover if they went to hearing, and maybe they settle for a very small thing that isn’t quite as good for the child as they might see from a due process hearing.” If parents have a limited knowledge of the intricacies of special education law and do not have an attorney to help guide them at the mediation stage, they may be unaware of exactly what a district should be providing for the student. Without that knowledge, mediation gives districts an opportunity to appear cooperative while actually shortchanging the parents and student.

A study on the subjective fairness of mediation found that many parents and district officials shared the concern over the potential unfairness of mediation sessions.<sup>81</sup> In the study, several parents and district officials perceived the mediation process to be unfair due to a power imbalance. Wealthier parents, especially those dealing with schools in low socioeconomic districts, tended to perceive the mediation as more fair than parents with fewer financial resources in a wealthy school district. Essentially, parents perceived mediation as less subjectively fair when the other party to the mediation was a wealthy or powerful school district. The reverse is true as well; school district officials in

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<sup>80</sup> Edwards, “Any Good IDEAs?”

<sup>81</sup> Kuriloff and Goldberg, “Is Mediation a Fair Way.”

the study reported mediation as unfair when the parents involved were particularly wealthy or influential.

These results suggest that mediation presents some of the same issues as due process hearings with regard to perceived fairness, but the dilemmas are packaged differently. In due process hearings, the parties—particularly parents—express concerns that the disparity in financial resources between the parties leads to an unfair procedural advantage or unfair outcomes. In the case of mediation, parents and district officials voice the worry that a disparity in power between the parties creates a scenario in which one party can take advantage of the other to get what they want without the expense of going through a due process hearing. More often than not, the parents are the party with less power and knowledge of the law. As a result, “in conflicts involving the IDEA, the parent is so severely and so frequently disadvantaged that mediation would not be an appropriate alternative to the due process hearing without some controls to mitigate the power imbalance.”<sup>82</sup> Every judge with whom I spoke agreed that due process hearings needed to remain an option for parents for precisely this reason. Despite the inherent problems with the hearings, they do offer some degree of procedural protection, and the judges articulated the need for parents to have due process hearings as a procedural recourse in the event that they are unable to mitigate the power imbalance with school districts during special education conflict resolution or negotiations over a child’s education.

It seems that mediation offers advantages to due process hearings but that those advantages are not sufficient to warrant the argument that mediation could replace due process hearings as a final stage in special education dispute resolution. Mediation is less

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<sup>82</sup> Shemberg, “Mediation as an Alternative.”

time-consuming and less financially and emotionally costly than due process hearings, but some of those advantages come at a price of their own. Mediation consumes less time because it eliminates many of the procedural protections included in the due process system. Due process hearings do not always make the procedural protections fully accessible to both parties, but objective fairness requires the existence of such protections along with their appropriate distribution to parties. Neither mediation nor due process hearings pass the test of objective fairness.

Although mediation costs less financially than due process hearings, weaker attorney presence leads to the lower financial burden. Many parents do not fully understand their rights under special education law, and without an attorney to help guide them, parents can fall into a mediation trap where they agree to a solution suggested by the district that offers less than what the law would require. Mediation often does produce innovative solutions to both legal and non-legal issues for students, which due process hearings cannot offer. However, that is not always the case, and even if both parties agree to the solution, if the outcome gives students less than the law requires, mediations are not necessarily providing good educational outcomes for the student involved. Mediation participants who recognize this problem created by a power imbalance without procedural protections report dissatisfaction with the mediation process and the fairness of the mediation outcome. Subjective fairness requires that the parties leave a proceeding feeling that they were fairly treated. If the parties perceive the mediation to be unfair, mediation does not offer subjective fairness or a significant improvement over due process hearings.

Mediation may be an attractive replacement for due process hearings, but it is also an insufficient replacement because it fails to consistently provide objective fairness, subjective fairness, and good educational outcomes. While mediation solves several of the fairness problems created by due process hearings, it creates fairness concerns of its own. Consequently, mediation does not appear to be the answer to the questions left by due process hearings.

### *Conclusion*

In the end, due process hearings fail to serve as a fair final dispute resolution option in special education conflicts. Due process hearings do not consistently offer good educational outcomes to students or a sense of subjective fairness to parents and districts. The hearings are modeled after the American civil court system, making them inherently adversarial. The antagonistic nature of the hearings destroys the relationship between parents and schools and ultimately hurts the child's education. Educational outcomes do not make up for the emotional damage done by the adversarial hearings, as even in a best-case scenario, the hearings provide only limited benefits to children because of the low standard *Rowley* establishes for districts. Judges and the literature agree: due process is a high cost, low reward system.

Congress continues to reauthorize the law that mandates due process as a final dispute resolution option. In interviews, the same judges who acknowledged that due process often hurts students maintained that due process should stay in place. Judges consistently offered the argument that because due process hearings offer crucial procedural protections other systems cannot provide, the hearings should remain the final

dispute resolution option in special education conflicts. However, while the hearings provide procedural protections in some cases, the protections are not universally accessible to all parties in special education due process hearings. The win-loss statistics for the hearings clearly demonstrate that parents without attorneys cannot effectively utilize the system's protections. If we are searching for fairness in these hearings, the claim does not work that due process hearings offer sufficient protections simply because those protections exist. The gap between protections written into the law and parties' ability to effectively utilize those protections in practice defeats the only justification given in defense of due process in a special education context.

The American legal system's fixation on due process and procedural protections may be to blame for judges' and legislators' insistence that due process should remain in place in a special education context. There appears to be an acceptance that as long as the same rules and procedures apply to everyone, proceedings are fair. In theory, if everyone has to play by the same rules, the outcome will be as unbiased as possible and the participants will feel that even if they lost, the hearing was fair because the rules applied to everyone. In essence, the procedural protections of due process exist to guarantee subjective fairness and outcome fairness.

In that case, something has gone wrong in special education due process, because hearings in a special education context are not leading to either subjective fairness or outcome fairness. The theory behind the purpose of due process is not the problem. The main goals should be to get good outcomes for students and for both sides to walk away from the process feeling like the proceedings were fair. If those two conditions are met, it does not really matter whether strict procedural guidelines are in place; that is not the

ultimate goal. Consequently, we should only aim to fix due process (rather than replace it) insofar as due process has the ability to lead to subjective and outcome fairness in the context of special education.

Special education due process has never historically demonstrated that it does have that ability. Parents, and some district officials, perceive the hearings as unfair or inappropriate regardless of whether they prevail. They articulate a concern over the adversarial dimension of due process. Due process does not make the list of final dispute resolution options void of adversarialism. Due process hearings are inherently adversarial because they pit two parties against each other to name a winner and a loser. If subjective fairness is dependent on nonadversarial proceedings, due process cannot lead to subjective fairness in special education. Outcomes are largely independent of the nature of due process. The hearings do not produce good outcomes for students because of the low standard set by the *Rowley* decision. Unless Congress amends the special education law or the Supreme Court sets a new precedent, due process will not be able to produce educational outcomes for students above “some” educational benefit.

Ultimately, due process proves unworkable in a special education context because the procedural elements of objective fairness conflict with subjective fairness and outcome fairness. To modify due process in order to ensure subjective fairness would necessitate modifying the system beyond recognition as due process, at least the way the system is traditionally understood. However, as this thesis illustrates, maintaining a rigid due process system in an effort to guarantee objective fairness frequently sacrifices the other types of fairness. Strong, traditional due process is not compatible with subjective fairness and objective fairness in the context of special education dispute resolution.

Yet, no system stands out as a clear alternative that addresses the inadequacies of due process. Every proposed alternative improves one aspect of fairness at the expense of another. For example, consider the proposal to replace administrative law judges with a panel of special education experts, a suggestion offered by some interviewees. Administrative law judges attend annual training on special education, but they do not specialize in the field. Rather, they are in essence jacks-of-all-trades, spreading their time across cases involving special education, licensing, public employee suspensions, workers' compensation, zoning disputes, complaints under the Fair Campaign Practice and Campaign Finance Act, issues regarding the Public Utilities Commission, and municipal code violations.<sup>83</sup>

If special education experts were to oversee the hearings instead, their knowledge and expertise could devise solutions more narrowly tailored to each student's specific needs in order for that student to receive substantial educational benefit. That benefit would come at a cost, however. Although an expert panel would likely improve the outcome fairness for students, it would also perpetuate the adversarial hearing model that denies subjective fairness. Even mediation, the most commonly suggested alternative to due process, cannot escape many of the same criticisms lodged at due process. As discussed in the previous section, mediation does provide solutions to some of the inherent problems of due process, but it does not solve all of them and presents some new issues of its own. At best, mediation sometimes increases outcome fairness or subjective fairness but participants are not always satisfied with mediation or there would be no need for an additional dispute resolution option (i.e. due process) in the first place.

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<sup>83</sup> "Services for Cities, Counties, and School Districts Provided by the Minnesota Office of Administrative Hearings," last modified December 11, 2007, <http://www.oah.state.mn.us/ALJ-Service.html>.



While due process hearings do not consistently provide objective, subjective, or outcome fairness, no specific alternative scholars have raised would satisfy the three types of fairness where due process fails. Even so, legislators, scholars, educators, and members of the legal community alike need to look further into potential replacements for the due process system. None of the alternatives currently on the table offers a full solution to the problems of due process, but the present dearth of fairer alternatives should not resolve the special education community to complacency with due process. In the end, there may be no perfect system, but the quest to attain the holy grail of special education dispute resolution hopefully will discover a much better system than due process.

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### Appendix: Issues Addressed in Special Education Due Process Hearings

Issue Categories	Number of Cases <sup>84</sup>	Category Description
IEP	<b>90</b> (45%)	Parents are challenging the content of a student's IEP or alleging procedural violations surrounding IEP meetings, such as failure to give parents proper notice of changes.
Evaluation	<b>73</b> (37%)	Parents are arguing that the district improperly evaluated their child, either by failing to refer the child for special education or by misidentifying the child's disability. When districts are pursuing a due process hearing, evaluation is often the issue (the district wants a student evaluated but parents refuse to give permission.)
Manifestation Determination	<b>13</b> (7%)	Disabled students cannot be suspended or expelled for behavior that is a manifestation of a student's disability. In these cases, parents seek to reverse a suspension or expulsion by arguing that the behavior was a manifestation of the student's disability.
Placement	<b>72</b> (36%)	Parents can challenge a child's placement in 3 ways: <ul style="list-style-type: none"> <li>• Ask that their child be placed in a regular education classroom rather than a special education room (the "least restrictive environment")</li> <li>• Ask that the district transport the child to a different public school within the district</li> <li>• Ask that the district pay private school tuition for a student</li> </ul> In every case, parents are contending that the child's environment is not calculated to provide meaningful educational benefit.
Service Provision	<b>83</b> (42%)	Parents are challenging that teachers are not effectively executing a child's IEP or asking the district to modify a child's specific services in order to better serve their needs.
Transition Services	<b>11</b> (6%)	Districts must provide life skills and occupational training to ease transitioning for disabled high school graduates. In these cases, parents are alleging that districts did not provide adequate services to equip the student for everyday real life challenges.
Teacher Qualifications	<b>13</b> (7%)	Parents are claiming that a teacher or aide working with their child is not qualified to provide FAPE.

<sup>84</sup> The number of cases that appear in this table is greater than 199 because some cases involved more than one issue. Similarly, the percentages will be greater in total than 100%. Manifestation determinations, transition services, and teacher qualifications are narrow categories relating to highly technical areas of special education law, and consequently those categories have substantially fewer cases than the other categories.